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No. 76-5729

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
PETITIONERS

*v.*

THE SUQUAMISH INDIAN TRIBE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is filed in response to the Court's order of February 22, 1977, inviting the Solicitor General to express the views of the United States.

### QUESTION PRESENTED[1]

Whether the Suquamish Indian Tribe has jurisdiction to try non-Indians for misdemeanors committed on trust land within the Port Madison Reservation.

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[1]We state here only the question presented by the *Oliphant* petition. In our view, the *Belgarde* case, which has not yet been decided by the court of appeals, should not be reviewed at this time. Under Rule 20 of the Rules of this Court, a writ of certiorari will be granted prior to judgment in the court of appeals "only upon a showing that the case is of such imperative public

## STATEMENT

The material facts in the *Oliphant* case are set forth at length in the opinion of the district court (Pet. App. A 1-4).

The Port Madison Reservation, located entirely within the borders of the State of Washington, is the home of the Suquamish Indian Tribe. The reservation consists of more than 7,000 acres, of which approximately 36 per cent are held in allotment status, *i.e.*, are being held in trust for individual Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388, and its successors. In addition, 41 acres of land are held in trust by the United States for the benefit of the Suquamish Tribe (Pet. 16-17).

The Suquamish Tribe is organized under the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. 476 *et seq.* In 1965 the Tribe adopted a Constitution and By-Laws, which were approved by the Secretary of the Interior,[2] and in 1973 it enacted a Judicial Code creating a tribal trial court and court of appeals (Pet. App.

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importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." No such showing has been made here. In addition, *Belgarde* may be distinguishable from *Oliphant* because the offense in *Belgarde* was alleged to have taken place on non-trust land (Pet. App. A 40).

To the extent the correct disposition of *Belgarde* is governed by the result in *Oliphant*, there is no need to grant review in the former case before judgment in the court of appeals. To the extent any factual difference might render the cases distinguishable, this Court should, before undertaking review of the case, have the benefit of the views of the court of appeals regarding the legal significance, if any, of the factual difference between *Belgarde* and *Oliphant*.

[2]Selected portions of the Constitution and By-Laws are reprinted at Pet. App. B 6-8.

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B 39 *et seq.*). Section 3 of Art. III of the Code (*id.* at 41-42) asserts that the tribal court shall have original jurisdiction over all but "major crimes,"[3] committed by Indians or non-Indians, occurring anywhere on the reservation.

On August 19, 1973, a few weeks after adoption of the Judicial Code, the Suquamish Indians were holding an encampment to celebrate a tribal holiday, Chief Seattle days. An incident, the precise character of which is unclear, led to the arrest by tribal authorities of petitioner Mark David Oliphant (a non-Indian) for assaulting a tribal officer and resisting arrest.[4] The alleged acts of Oliphant and his arrest both occurred upon the land held in trust for the tribe by the United States.

Oliphant was arraigned before the tribal court, and bail was set at $200. He did not put up bail and was briefly incarcerated in a local city jail until his release on his own recognizance.[5] On August 23, 1973, Oliphant petitioned for a writ of habeas corpus in the United States District Court for the Western District of Washington, pursuant to 25 U.S.C. 1303 (the Indian Civil Rights Act), challenging the jurisdiction of the Suquamish Tribal Court to try him, a non-Indian, for acts allegedly committed on the reservation (Pet. 10).[6]

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[3]As defined in 18 U.S.C. 1153; but see limitations on tribal court powers set forth in the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1302.

[4]See Chapter III, Tribal Code (Pet. App. B 47, 64): Assault (30 days and/or $60); resisting arrest (60 days, $120) (Pet. App. B 48, 64).

[5]The city houses tribal prisoners by agreement with the United States Department of the Interior (Pet. App. A 2).

[6]The district court did not address the issue of post-release eligibility for habeas corpus relief. The court of appeals, however, held that "Oliphant's release on his own recognizance [on August 24, 1973] did not deprive the district court of [habeas corpus] jurisdiction," citing *Hensley* v. *Municipal Court*, 411 U.S. 345 (Pet. App. A 9). Respondents do not now challenge this holding.

The district court denied the petition, holding that the Suquamish Tribe's inherent sovereignty, which includes the right to enforce criminal laws of general application, has been limited but never divested or terminated by Congress (Pet. App. A 3-6). A divided panel of the court of appeals affirmed. It concluded that no treaty, act of Congress, or act of the State of Washington deprived the tribe of its inherent power to try non-Indians as well as Indians for crimes committed on the reservation (Pet. App. A 9-16) and that the tribe's exercise of jurisdiction did not "interfere with or frustrate the policies of the United States" (Pet. App. A 16).

In dissent, Judge Kennedy noted that the issue of Indian jurisdiction over non-Indians had not been addressed in the federal courts since 1878. In the absence of clear judicial precedent supporting or denying the validity of such tribal jurisdiction, he reasoned, various Attorney General and Interior Department opinons, court of appeals dicta, and congressional remarks indicating that tribes lacked such jurisdiction, should govern this case (Pet. App. A 21-23).

**DISCUSSION**

The court of appeals noted that "[t]his case involves a question of Indian law which has been unresolved since it first arose almost a century ago * * * " (Pet. App. A 8). In fact, the decisions of the district court and court of appeals in this case appear to be the first reported decisions ever to pass upon the question whether Indian tribal courts have jurisdiction over offenses committed by non-Indians on tribal trust lands. Were the issue more narrow or of less immediate importance, or were the opinions of the court of appeals less thorough and thoughtful, we might suggest that this Court postpone review of this question until other circuits had considered it or, perhaps, Congress had addressed the matter by legislation. But this case involves difficult issues regarding not only the scope of inherent



tribal sovereignty but also the effect of broad federal statutes, including 18 U.S.C. 1152 (Laws Governing in Indian Country) and Pub. L. 280, 67 Stat. 588, 25 U.S.C. 1321 *et seq.* (State jurisdiction over Indian lands). Moreover, the decision below, directly or indirectly, may greatly stimulate the exercise of tribal court criminal jurisdiction over non-Indians on reservations throughout the United States, and no prompt legislative resolution appears to be in the offing. Under these circumstances, we believe that the Court should grant the petition for a writ of certiorari at this time.

1. The questions presented in this case are of considerable importance to Indian tribes throughout the United States. Although Indian tribal courts were generally less conspicuous during the 19th and early 20th Centuries than they have become, recent statistics compiled by the Department of Interior indicate that tribal courts are presently operating on approximately 71 reservations and that more than 30 tribes have enacted ordinances asserting criminal jurisdiction over non-Indians. The Final Report of the American Indian Policy Review Commission indicates that such courts, though varying in individual performance, in general "are evolving institutions * * * capable of fair and efficient justice." Report, p. 5-42.[7] The ability of tribal Indians to adjudicate their grievances through established tribal courts is regarded as an important aspect of Indian law enforcement and self-government. *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F. 2d 1140, 1144-1145 (C.A. 8).

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[7] The Commission was established by Pub. L. 93-580, 88 Stat. 1910, "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians" (25 U.S.C. (Supp. V) 174). The Commission's Report was submitted to the Congress on May 17, 1977.

The Indian tribes need to know, for very practical reasons, whether they have criminal jurisdiction over non-Indians on trust land within their reservations. Although many tribes have cooperative relationships with state authorities, state courts frequently lack jurisdiction over reservation matters,[8] and in any event, available state personnel, as this case demonstrates (Pet. App. A 17), may prove inadequate to protect tribal interests. Federal authorities are often located at considerable distances from Indian reservations or, as this case also demonstrates (*ibid.*), may not be available at all. See Hearings on S. 1 and S. 1400 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part VIII, pp. 6469 *et seq.* (1973). If tribes lack the power to enforce tribal laws against non-Indians in tribal court, that deficiency should be made clear so that efforts may be concentrated on development of other avenues of law enforcement. Should tribes have that power, on the other hand, a decision of this Court to that effect will eliminate the present uncertainties and permit state, federal, and tribal governments to share law enforcement responsibilities in accordance with settled principles.

While we believe that the extent of tribal court jurisdiction over non-Indians is ultimately a fit subject for legislative disposition, legislative resolution of this question does not appear imminent. The current proposal for revision of the Federal Criminal Code does not attempt to alter the existing state of tribal court jurisdiction. The American Indian Policy Review Commission, while favoring tribal jurisdiction over non-Indians, does not

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[8]States generally lack criminal jurisdiction over matters involving Indians within a reservation unless they have acquired such jurisdiction in accordance with the provisions of Pub. L. 280 (25 U.S.C. 1321 *et seq.*). See p. 9; *infra*.



propose enactment of any new legislation on that subject. It does not seem appropriate, therefore, to postpone review of this issue in the expectation that Congress will act in the immediate future to clarify or settle the law.

2. From a legal as well as practical standpoint, the issues in this case are difficult and important. The power of Indian tribal courts to try non-Indians for crimes committed within Indian territory has over the years been the subject of intermittent comment. During the 19th century two opinions of the Attorney General (2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855)) and dictum in a single federal case (*Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C. W.D. Ark.)) stood for the proposition that tribal courts lacked such jurisdiction. The circuit court in *Ex part Kenyon* stated (14 Fed. Cas. at 355): "[T]o give [the Cherokee tribal] court jurisdiction of an offender, such offender must be an Indian, and the one against whom the offence is committed must also be an Indian." This observation, like the analysis in the Attorney General's opinions, rested at bottom on construction of Section 25 of the Trade and Intercourse Act of 1834, 4 Stat. 733, now 18 U.S.C. 1152 (as modified).

That earlier viewpoint has been sporadically repeated during the 20th century. In 1960, for example, a Senate Report supporting a bill to prohibit unauthorized entry on Indian land for the purpose of hunting or fishing took the position that "[n]on-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges" (S. Rep. No. 1686, 86th Cong., 2d Sess. 2-3 (1960)). Ten years later, an opinion of the Solicitor for the Department of Interior, 77 I.D. 113, 115, stated: "[U]nless there still remains in force a treaty provision whereby a tribe acquired '*exclusive jurisdiction over such offense*' as provided by [18 U.S.C.] 1152, Indian

tribes generally do not possess criminal jurisdiction over non-Indians" (emphasis in original). That opinion subsequently was withdrawn.

The court of appeals, on the other hand, found these opinions and statements to be totally incompatible with recognized doctrines of tribal sovereignty. Noting that "the various Indian tribes were once independent and sovereign nations * * * " (*McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172; Pet. App. A 9), the court found no express action by Congress revoking the sovereign tribal right "to preserve order on the reservation, when necessary by punishing those who violate tribal law" (Pet. App. A 9-10). Unlike the circuit court in *Ex parte Kenyon, supra*, the court of appeals viewed 18 U.S.C. 1152 as establishing *concurrent* federal and tribal jurisdiction over crimes by non-Indians within Indian country without "attempt[ing] either to extinguish tribal jurisdiction or to declare federal jurisdiction exclusive" (Pet. App. A 11-12). The court also rejected (Pet. App. A 7-9) the argument that tribal jurisdiction over non-Indians on the Suquamish Reservation had been preempted by the authority of Pub. L. 280, 25 U.S.C. 1321 *et seq*.

Resolution of these questions, in our view, may require detailed consideration of the nature and scope of inherent tribal sovereignty as well as the effect on tribal jurisdiction of the provisions of 18 U.S.C. 1152 and Pub. L. 280, 25 U.S.C. 1321-1323. The majority and dissent below disagreed at the outset over whether the Tribe's inherent sovereignty (apart from the effect of any congressional enactments) encompasses the power to try non-Indians for offenses committed within the Reservation, an issue with implications far beyond the present case. In addition, a fresh examination of 18 U.S.C. 1152 may be needed to determine whether its predecessors conferred exclusive jurisdiction



upon federal courts, a plausible contention that nonetheless is not made clear by either the language of the statute or its legislative history.

Finally, we note that the Attorney General of Washington has claimed to exercise Pub. L. 280 jurisdiction on trust lands, as to non-Indians only, despite a state statute apparently disclaiming any jurisdiction whatever over such lands. It may be necessary, therefore, to determine the extent of jurisdiction that Washington has over trust land pursuant to its own laws of 1963 (see Pet. App. B). Were the State Attorney General's contention sustained, it would then be necessary to determine whether a State, consistently with Pub. L. 280 and the Constitution, may assert jurisdiction only over non-Indians in selected areas within the reservation,[9] and, if so, whether such jurisdiction must be deemed exclusive of that of the tribe.

The underlying issue is sensitive and socially significant. While quiescent in the past, the issue now must be confronted. Whatever steps are to be taken in arriving at a wise allocation of power and responsibility in the future should be considered against a background of clear and settled present law, which does not exist today. Accordingly, despite the absence of a conflict in the circuits, we believe that this case merits review by this Court.

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[9]In *Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, No. 74-1225, decided April 29, 1977, a panel of the Ninth Circuit has held that the State of Washington could not constitutionally exercise jurisdiction over specified lands within Indian country but refuse to exercise jurisdiction over tribal trust lands.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

DREW S. DAYS, III,
*Assistant Attorney General.*

JUNE 1977.